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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

RUETTA PARIS, MILDRED CAWTHON AND MARGE KANE, INDIVIDUALLY AND ON BEHALF OF THE CERTIFIED CLASS,

Petitioners,

V

PROFIT SHARING PLAN OF HOWARD B. WOLF, INC. AND EUGENE K. FRIESEN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a Trustee of a Pension and Profit Sharing Plan can arbitrarily and capriciously disregard the express language of the plan to exclude certain employee- participants.

2. Whether employees who were expressly included as participants in a Pension and Profit Sharing Plan at the time of its effective date, can be excluded from participation in the plan?

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OPINIONS BELOW

The opinion of the Court of Appeals (App. pp. 5 - 31, infra) is reported at 637 F.2d 357. The opinion of the District Court for the Northern District of Texas (App. pp. 1 - 4, infra) is unreported.

JURISDICTION

The judgment of the court below (infra, Appendix pp. 5 - 31) was entered on February 17, 1981. A timely petition for rehearing was denied on March 24, 1981 (Appendix pp. 32 - 33). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL, STATUTORY AND RULES PROVISIONS INVOLVED

The Employee Retirement Income Security Act of 1974, 29 U.S.C.A. §1132, provides in pertinent part:

> (a) A civil action may be brought -
>
> (1) by a participant or beneficiary -
>
> (A) for the relief provided for in subsection (c) of this section, or
>
> (B) to recover benefits due to him under the

terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

* * *

(c) Any administrator who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper.

Further, 29 U.S.C.A. §1144 (b)(1) provides:

(b)(1) This section shall not apply with respect to any cause of action which arose, or any act

or omission which occurred, before January 1, 1975.

CONCISE STATEMENT OF THE CASE

Petitioners Ruetta Paris, Mildred Cawthon, and Marge Kane, individually and on behalf of the class of all persons who were employees of Howard B. Wolf, Inc. or Marcy Lee, Inc., on June 1, 1973, and whose employment with said companies terminated before February 21, 1974, brought this action against the Profit Sharing Plan for Employees of Howard B. Wolf, Inc. ("Defendant Plan") and Eugene K. Friesen, Administrator to recover amounts due Petitioners under the Defendant Plan. The class was duly certified with Petitioners as class representatives and notices were duly forwarded. Both Petitioners and Defendants filed Motions for Summary Judgment. The District Court initially informed all parties that the

Court was granting Petitioners' Motion for Summary Judgment, and Defendants filed a Motion for Reconsideration. On reconsideration, the District Court granted Defendants' Motion for Summary Judgment and Petitioners appealed that judgment to the United States Court of Appeals for the Fifth Circuit. The Court of Appeals affirmed, finding that the Trustee's determinations that Petitioners were not participants in the Defendant Plan was not "arbitrary or capricious".

The basis for Federal jurisdiction in the court of first instance is 29 U.S.C.A. §1132 (a)(1)(B). Based on this section, the Fifth Circuit Court of Appeals held that there is proper federal subject matter jurisdication pursuant to ERISA.

The facts material to the consideration of the questions provided are

straight forward and were stipulated to by the parties in the District Court. Petitioners were employees of Howard B. Wolf, or its subsidiary Marcy Lee, Inc. (referred to as "Wolf") as of June 1, 1973, but whose employment ceased between that date and February 21, 1974. The Petitioners were participants in the Trusteed Retirement Plan for Employees of Howard B. Wolf, Inc. (Pension Plan) prior to the time of their termination of employment with Wolf. On February 21, 1974, the Defendant Plan was adopted by the Board of Directors of the Employer. By its very terms the Defendant Plan was made retroactive, and was to be effective as of June 1, 1973. The Defendant Plan provided that all amounts held for the benefit of the participants in the Pension Plan were to be transferred to the Trustees for the Defendant Plan, which was

established to "supercede and replace the aforementioned Pension Plan". These funds were to be administered "in accordance with the provisions of the trust agreement" (referring to the Defendant Plan).

On June 12, 1975, Petitioner Marge Kane made her first request for information concerning the Defendant Plan, and on August 17, 1975, Petitioner Ruetta Paris requested information concerning the Defendant Plan from the Trustee. The administrator of the Defendant Plan failed to answer said requests within 30 days as is mandated by ERISA, 29 U.S.C. §1132(c). Such denial of information amounted to a constructive denial by Respondents of benefits to the Petitioners under the Defendant Plan.

REASONS FOR GRANTING THE WRIT

This case presents an important question of whether an administrator of a Pension or Profit Sharing Plan can unilaterally exclude employees who are defined as plan participants by the express language of the plan. The federal government has displayed a great concern for the protection of employees involved in Pension or Profit Sharing Plans. The opportunity for employers to take unfair advantage of unknowing and unsuspecting employees is great in this area. Because of this Congress has enacted ERISA, to regulate these Pension and Profit Sharing Plans, and the Federal Courts are entrusted to enforce these plans.

The sole issue under both questions presented here is whether or not Petitioner-employees can be excluded as

participants in the Defendant Plan in spite of the express language to the effect that all employees on the effective date of June 1, 1973, were included, merely because the plan was formally adopted after the termination of Petitioner employees.

As Judge Teitelbaum stated in Tucci v. Edgewood Country Club, 459 F.Supp. 940, 942 (W.D. Penn. 1978), a strikingly similar case to the one at bar:

> Defendants' viewpoint is untenable because of the explicit language of the 1976 retirement plan. The plan introduction, as specifically authorized by the Board of Directors of Edgewood Country Club, states at page 3:
>
> > 'It is intended that the existing plan, as changed, will comply with the requirements of the Employee Retirement Income Security Act of 1974 and any subsequent amendments to the Act. It is believed that the best means to accomplish such changes is to amend said plan to completely restate the terms provisions

and conditions of said plan, which restatement, effective June 1, 1975, is substituted in lieu of said plan.

All persons covered under the existing plan on May 31, 1975, will be covered under the restated plan. . . '

Plaintiff was indisputably a person covered by the 1958 plan on May 31, 1975, because his employment did not cease until February 17, 1976. Therefore, pursuant to the express language ratified by the Edgewood Board of Directors, Plaintiff is a participant under the 1976 retirement plan. (emphasis added)

The express terms of the Defendant Plan are clear and unequivocal. "Each employee who is a participant in the trusteed retirement plan will become a participant in the plan as of the effective date of the plan." The Defendant Plan defines the effective date as June 1, 1973. Therefore, this language is clear and unambiguous and virtually identical to Tucci. On June 1, 1973, all employees who

were participants in the Pension Plan, automatically became participants in the Defendant Plan and their rights should be construed under the new plan. "[T]he court cannot in construing a pension agreement ignore its clear provisions." Brinzo v. Phoenix Steel Corp., 304 A.2d 66, 67 (Del. Ch. 1973). The terms of the Defendant Plan are clear, and the Petitioners have a right to enforce such terms. "The employee has a contractual right to enforce the plan according to its terms, and such benefits may not be denied arbitrarily." Levitt v. Billy Penn Corporation, 283 A.2d 873 (Pa. Super. 1971). Looking at the four corners of this document, the language is clear and unambiguous so that construction thereof is neither necessary or proper. Stevenson v. ITT Harper Co., 366 N.E.2d 561 (Ill. App. 1977). The terms of the Defendant

Plan have a "plain meaning" and therefore the Court should not look outside the document for interpretation. The unambiguous plain meaning of the terms of the Defendant Plan make all employees who were participants in the Pension Plan participants in the new plan as of its effective date, June 1, 1973. Petitioners qualify under this language and are therefore participants in the Defendant Plan and are entitled to have their benefits determined thereunder.

The Trustee's determination that the Petitioner-employees are not members of the Defendant Plan is arbitrary and capricious, and therefore should be overturned by this Court. The facts of the case create a presumption that the Trustees acted arbitrarily, capriciously, and in bad faith.

The Trustees of the Proft Sharing

Plan for employees of HOWARD B. WOLF, INC. were CHARLES S. WOLF; HERBERT ALBAUM, HOWARD B. WOLF, and HENRY SCHLINGER. CHARLES S. WOLF, HOWARD B. WOLF, and HERBERT ALBAUM were the highest paid employees of the company and received the highest allocations of the Trust funds' assets (although an individual named M. W. Becker did receive a higher allocation than Herbert Albaum). CHARLES WOLF and HOWARD WOLF each received allocations of more than $90,000.00 and HERBERT WOLF received an allocation of almost $50,000.00. Only twelve employees received allocations in excess of $10,00000. The total allocations for those twelve employees was $505,267.00 out of a total allocation of $645,056.00. In other words, out of a total of 148 employees who received allocations, the twelve of the highest paid employees received 78.33% of the total amount allo-

cated. Since the amount allocated included the sums forfeited by the members of the Petitioners' class, it is clear that the twelve individuals described above (including three of the four Trustees of the Proft Sharing Plan) received over 78% of the amounts forfeited. Specifically, HERBERT ALBAUM received 7.7% of the total forfeitures, CHARLES WOLF received 14.1% of the total forfeitures, and HOWARD WOLF received 14.5% of the total forfeitures. The three Trustees who have received allocations received a total of 36.3% of the amounts forfeited by the Petitioners. Under such circumstances, the unilateral action of the Trustees in denying benefits to the Petitioners' class is highly suspect. Three of the Trustees clearly had a compelling personal interest in deciding that the Petitioners were not entitled to bene-

fits. These three Trustees individually received more than 36% of the amount which they themselves declared forfeited. By the undisputed facts and by trial stipulation between the parties, the members of the Petitioners' class were participants in the Pension Plan. The terms of the Profit Sharing Plan are not in any way ambiguous. The Circuit Court's decision that the Trustees' determination of ineligibility was not arbitrary or capricious, deprives the members of the Petitioners' class of any opportunity for an unbiased deliberative body to fairly determine their entitlement to benefits. The Circuit Court is clearly incorrect in determining that the Trustees' actions were not arbitrary, since the Trustees completely disregarded the plain wording of the Profit Sharing Plan for their own benefit and the benefit of the high paid cadre of the corporation.

In addition to being arbitrary, Petitioners submit that the actions of the Trustees in denying benefits to the Class were in bad faith. The standard of review of Trustees' actions was first enunciated in Danti v. Lewis, 312 F.2d 345, 348 (D.C. Cir. 1962). That Court phrased the standard as "whether the Trustees have acted arbitrarily, capriciously, or in bad faith; that is, is the decision of the Trustees supported by substantial evidence or have they made an erroneous decision on a question of law." The standard incorporating bad faith was upheld in Wardle v. Central States, Southeast and Southwest Areas Pension Fund, 627 F.2d 820 (7th Cir. 1980). Since the individual Trustees were substantially rewarded individually for their denial of beneifts to the Class Members, the Class is entitled to a presumption that their actions did not meet the strict standards required of fidu-

ciaries.

Further, the Trustees' determinations were arbitrary, capricious and in bad faith because they did not treat all similarly situated persons the same. The Circuit Court states that the Trustees treated all similarly situated persons the same in this case. Petitioners respectfully disagree. Petitioners were undeniably participants in the old Pension Plan, as were the employees who remained in the company's employment after February of 1974. The clear terms of the Profit Sharing Plan state that the Petitioners are entitled to have "former Retirement Plan accounts" established in their names in the Profit Sharing Plan along with those persons who remained employed at HOWARD WOLF. In violation of the clear terms of the Profit Sharing Plan, the Trustees failed to make such allocations,

and that failure constituted an arbitrary discrimination against the members of the Petitioners' class. The Class Members were as entitled to receive the unvested portions of their pension plan benefits as those whose circumstances allowed them to remain employed.

The Circuit Court makes several assumptions which are unwarranted by the facts. It states that "The profit Sharing Plan's resources are still dedicated to the participants; the Trustees' policy will direct money to those who were employed on the adoption date." Petitioners suggest that the Class Members are "participants" in the Profit Sharing Plan by virtue of its terms. As stated in the paragraph titled FACTS in the Profit Sharing Plan, the Class Members became participants in the Profit Sharing Plan by virtue of the fact that they were par-

ticipants in the Pension Plan, and all amounts held for their benefit should have been transferred according to the terms of the Trust Agreement for the Profit Sharing Plan. The fact that the Trustees unilaterally decided not to make such an allocation does not deprive the Class Members of their legal status as participants. The Circuit Court's statement that "The Trustees' policy will direct money to those who were employed on the adoption date" avoids the entire issue presented by the case. That is precisely the policy under which the Trustees have acted in the past to enrich themselves and the other employees who remained. The allocations under the Defendant Plan were made to 148 persons. To the best of Petitioners' knowledge, the class herein consists of 198 persons. Under the Circuit Court's construction, the benefits to which the

many are rightfully entitled will be forfeited and reallocated for the benefit of the few. The clear terms of the Profit Sharing Plan require the opposite result, and equity demands it.

The precise topic of the right of employees who have terminated employment before the adoption of a Pension Plan, but after its effective date has been discussed in two cases. Sparta v. Lawrence Warehouse Co., 368 F.2d 227 (3rd Cir. 1966) is the case relied on by the Respondents in this action. In Sparta, the Court held that an employee was not entitled to benefits under the new plan. However, the Court in Sparta makes no mention of the language of the new plan which it was construing, and therefore it is not possible to ascertain its similarity to the Defendant Plan in this case. Further points which distinguish Sparta from the

case at bar is that the sole claimant there had no vested rights as opposed to the rights vested in this case; the "balancing" of only one claimant against the other beneficiaries in Sparta as opposed to the large class here wrongfully excluded; and the express language in the predecessor to the Wolf plan that the effective date of any future amendment thereto would be for all purposes."

Further Sparta is not Federal precedent. Sparta is not a decision under ERISA, but simply a diversity action whereby the Third Circuit Court of Appeals is interpreting New Jersey law. Therefore, the Federal precedent to be considered herein, as above noted, is Tucci v. Edgewood Country Club, 459 F.Supp. 940 (W.D. Penn. 1978). In that case, the court held that an employee whose employment was terminated when the

employer sponsored Retirement Plan was not yet adopted, could nevertheless be called a plan participant where the later adopted plan was made retroactive to a date prior to the employee's termination. The opinion in Tucci also includes the pertinent language of the Pension Plan of the Defendant company in that case:

> It is believed that the best means to accomplish such changes is to amend said [old] plan to completely restate the terms, provisions and conditions of said plan, which restatement, effective June 1, 1975, is substituted in lieu of said plan.
>
> All persons covered under the existing plan on May 31, 1975, will be covered under the restated plan . . . Tucci at 942.

This language is very similar to the language of the Defendant Plan which states the Defendant Plan is to "supercede and replace" the Pension Plan, and "Each employee who is a participant in the Trusteed Retirement Plan [old plan] will

become a participant in the plan [new plan] as of the effective date of the plan." The court in Tucci commented on the contention that Plaintiff was not a participant in the new plan (the same contention expressed by Respondent in this case) by stating, "Defendants' viewpoint is untenable because of the explicit language of the 1976 Retirement Plan." Tucci at 942. The court went on to state its holding:

> Plaintiff was indisputably a person covered by the 1958 plan on May 31, 1975, because his employment did not cease until February 17, 1976. Therefore, pursuant to the express language ratified by the Edgewood Board of Directors, Plaintiff is a participant under the 1976 retirement plan. Tucci at 942.

It is clear that the Trustee herein arbitrarily and capriciously ignored and disregarded the clear and definite language of the Profit Sharing Plan to deny the Petitioners' Class of

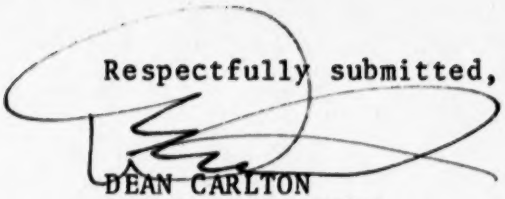
employees their rights under the plan. The Petitioners in this case should be adjudged participants in the Defendant Plan, and should be entitled to all the benefits thereunder.

CONCLUSION

The present case is illustrative of the unfair advantage that can be taken of employees by a company for its own gain and for the benefit of upper-management personnel. The Petitioners Class is included as participants in the Defendant Plan by its clear and express language, and therefore the Petitioners have been wrongfully denied these rights.

For the reasons set forth above, this petition for a writ of certiorari should be granted.

Respectfully submitted,



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APPENDIX

IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

RUETTA PARIS, MILDRED CAWTHON, and MARGE KANE,	X	
Plaintiffs,	X	
V.	X	CIVIL ACTION NO. CA3-76-0297-C
PROFIT SHARING PLAN FOR EMPLOYEES OF HOWARD B. WOLF, INC. and EUGENE K. FRIESEN,	X	
Defendants.	X	

SUMMARY JUDGMENT

Defendants, PROFIT SHARING PLAN FOR EMPLOYEES OF HOWARD B. WOLF, INC. and EUGENE K. FRIESEN ("Defendants") having moved the Court for summary judgment in their favor that Plaintiffs' claim be dismissed and that Plaintiffs take nothing by virtue of the above-entitled action, on the ground that there is no genuine issue as to any material fact and that Defendants are entitled to judgment as a

matter of law, further;

Plaintiffs RUETTA PARIS, MILDRED CAWTHON and MARGE KANE having filed their Motion for Summary Judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, on the issue of liability as against Defendants; and

The Court having considered then reconsidered the Motions for Summary Judgment, the pleadings herein, Plaintiffs' Request for Admissions and Interrogatories, the Responses of Defendants thereto and the Stipulation of Facts filed herein on May 10, 1977 and, having granted the Motion to Intervene filed by Stella Hodkinson filed herein on August 28, 1978, it is therefore

ORDERED, that Defendants' Motion for Summary Judgment be, and the same hereby is, granted and that

(1) the claims of Plaintiffs RUETTA PARIS, MILDRED CAWTHON and MARGE KANE are hereby dismissed with prejudice;

(2) that Plaintiffs RUETTA PARIS, MILDRED CAWTHON and MARGE KANE take nothing by this suit;

(3) that Defendants have from Plaintiffs their costs of suit, for which let execution issue.

IT IS FURTHER ORDERED that Plaintiffs' Motion for Summary Judgment be, and the same hereby is, denied.

All relief not expressly granted

herein is denied.

SIGNED this 3rd day of April, 1979.

/s/ W. M. TAYLOR
UNITED STATES DISTRICT JUDGE

Ruetta PARIS, Mildred Cawthon and Marge Kane, Plaintiffs-Appellants,

v.

PROFIT SHARING PLAN FOR EMPLOYEES OF HOWARD B. WOLF, INC. and Eugene K. Friesen, Defendants-Appellees.

No. 79-2286,

United States Court of Appeals, Fifth Circuit,

Feb. 17, 1981.

Suit was brought against profit sharing plan and its trustee by former employees who sought recovery of benefits under the plan. The United States District Court for the Northern District of Texas, at Dallas, William M. Taylor, Jr., J., entered judgment for defendants, and plaintiffs appealed. The Court of Appeals, Henderson, Circuit Judge, held that: (1) there was federal subject-matter jurisdiction, and (2) employees who worked for company or its subsidiary on June 1, 1973, but who resigned or were terminated prior to February 21, 1974,

were not entitled to benefits under new profit sharing plan that was adopted on the latter date; the plan trustee's determination of ineligibility withstood scrutiny under the arbitrary or capricious standard.

Affirmed.

1. Federal Courts (Key) 5

A congressional grant of jurisdiction to the federal courts not based on the citizenship of a party can only encompass cases, in law and equity, arising under the Constitution, laws of the United States, and treaties made under their authority. U.S.C.A. Const. Art. 3, §2, cl. 1.

2. Federal Courts (Key) 243

Since, in suit brought against profit sharing plan and its trustee by former employees who sought recovery of

benefits under the plan, plaintiffs did not rest their case on acts or omissions occurring in 1974, i. e., the suit did not challenge the adoption of the plan in 1974, since plaintiffs' complaint concerned the trustee's 1975 interpretation of the plan, and since it was only with that decision that it became clear plaintiffs would be denied benefits, the federal courts had jurisdiction to examine the validity of that 1975 determination under the Employee Retirement Income Security Act. Employee Retirement Income Security Act of 1974, §§502, 514, 514(b)(1), 29 U.S.C.A. §§1132, 1144, 1144(b)(1).

3. Action (Key) 61

A cause of action accrues when the events upon which it is based occur.

4. Action (Key) 61

A cause of action does not become a presently enforceable demand until a claim is denied.

5. Master and Servant (Key) 78.1(8)

For purposes of the Employee Retirement Income Security Act, a cause of action does not accrue until an application for benefits is denied. Employee Retirement Income Security Act of 1974, §514, 29 U.S.C.A. §1144.

6. Master and Servant (Key) 78.1.(8)

Although the determination of eligibility for pension benefits seems to be a matter of contract law, the clear weight of federal authority mandates that the pension plan trustee's determinations of eligibility be upheld unless arbitrary or capricious.

7. Master and Servant (Key) 78.1(5)

Employees who worked for company or its subsidiary on June 1, 1973, but who resigned or were terminated prior to February 21, 1974, were not entitled to benefits under new profit-sharing plan that was adopted on the latter date; the plan trustee's determination of ineligibility withstood scrutiny under the arbitrary or capricious standard.

8. Master and Servant (Key) 78.1(7)

Plaintiffs, who brought suit against profit-sharing plan and its trustee to recover benefits allegedly due under the plan, did not attempt to demonstrate that they were prejudiced by the alleged failure of the plan trustee to respond to plaintiffs' request for information, accordingly, the disrict court did not abuse its discretion in failing to penalize the trustee in accordance with provision of the Employment Retirement

Income Securities Act. Employee Retirement Income Securities Act of 1974, §§3(16)(A), 104(b)(4), 502(c), 29 U.S.C.A. §§1002(16)(A), 1024 (b)(4), 1132(c).

Appeal from the United States District Court for the Northern District of Texas.

Before RUBIN, HENDERSON and REAVLEY, Circuit Judges.

HENDERSON, Circuit Judge:

The ultimate issue in this appeal is whether employees who worked for Howard B. Wolf, Inc. or Marcy Lee, Inc. on June 1, 1973, but who resigned or were terminated prior to February 21, 1974, are entitled to benefits under a new profit sharing plan which was adopted on the latter date. The resolution of this issue entails extensive consideration of our jurisdiction in such cases. We conclude that we have jurisdiction, and affirm the

district court's determination that the appellants are not entitled to benefits.

In 1960 Howard B. Wolf, Inc. (hereinafter referred to as "the employer") established a "Trusteed Retirement Plan for Employees of Howard B. Wolf, Inc." (hereinafter referred to as "the Retirement Plan"). The employer created the defendant "Profit Sharing Plan for Employees of Howard B. Wolf, Inc." (hereinafter referred to as "the Profit Sharing Plan") on February 21, 1974. The Profit Sharing Plan had a retroactive effective date of June 1, 1973, and the Retirement Plan was retroactively terminated as of that time. "The terms of the Profit Sharing Plan provided, inter alia, that benefits which had been held under the ... Retirement Plan for Participants under the ... Retirement Plan would be be transferred on a fully vested

basis to the Profit Sharing Plan in individual 'former retirement plan accounts' which would be established under the Profit Sharing Plan." Stipulated Facts ¶4.

The plaintiffs are the class of those who were employed by Howard B. Wolf, Inc. and its subsidiary on June 1, 1973, whose employment had been terminated before the adoption date of February 21, 1974. They sued the Profit Sharing Plan and its trustee to recover benefits they claimed under the Profit Sharing Plan. They also allege that during the summer of 1975 certain named plaintiffs requested information about the Profit Sharing Plan, and that the defendant trustee failed to respond within thirty days, in violation of 29 U.S.C.A. §1132(c). Jurisdiction is predicated on §502(c) of the Employee

Retirement Income Security Act of 1974 (hereinafter referred to as "ERISA"), 29 U.S.C.A.§1132(e)(1).[1]

The defendants deny that the plaintiffs were entitled to benefits. They do admit that some plaintiffs sought plan information in 1975, but assert that all requests were answered in such a manner as to make clear the claimants were not entitled to benefits. The defendants also dispute ERISA jurisdiction.

All parties filed motions for summary judgment, pursuant to stipulated facts. After the district court notified the parties that the plaintiffs' motion would be granted, the defendants moved the

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1. Hereafter reference is made only to the U.S.C.A.

court to reconsider.[2] The plaintiffs failed to respond and, on April 3, 1978, the district court granted summary judgment to the defendants without stating reasons for its decision.

A participant in a benefit plan may bring a civil action to recover benefits, 29 U.S.C.A. §1132(a)(1)(B). State and federal trial courts have concurrent jurisdiction over such suits. 29 U.S.C.A. §1132(e)(1). ERISA supersedes "all state laws" relating to covered benefit plans,

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2. Subsequently, Stella Hodkinson sought to intervene as a plaintiff. The defendants opposed, but conceded that she was a "bona fide participant in the profit sharing plan." R. 240, Hodkinson insisted that "[a] ruling with respect to the entitlement of the class members to benefits under the defendant plan could affect as a practical matter the amount of benefits available to [Hodkinson] by proportionately reducing those funds available for profit sharing distributions R. 235. The court allowed the intervention, then dismissed her action without prejudice.

effective January 1, 1975. 29 U.S.C.A. §1144(a). It further provides that this "section shall not apply with respect to any cause of action which arose, or any act or omission which occurred, before January 1, 1975." 29 U.S.C.A. §1144(b)(1).

[1] A congressional grant of jurisdiction to the federal courts not based on the citizenship of a party can only encompass "Cases, in Law and Equity, arising under [the] constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority." U.S. Const. art. III, §2, cl. 1. In Association of Westinghouse Salaried Employees v. Westinghouse Electric Corp., 348 U.S. 437, 75 S.Ct. 489, 99 L.Ed. 510, (1955), Justice Frankfurter, speaking for a plurality, said "[i]f ... Congress merely furnished a

federal forum for enforcing the body of contract law which the States provide, a serious constitutional problem would lie at the threshold of jurisdiction," 348 U.S. at 442, 75 S.Ct. at 491, 99 L.Ed. at 515; that is, the case would not be one "arising under" federal law.

With Westinghouse in mind, the First Circuit Court of Appeals reads §1144 as limiting §1132 jurisdiciton to causes of action originating after January 1, 1975. Cowan v. Keystone Employee Profit Sharing Fund, 586 F.2d 888 (1st Cir. 1978). See also Martin v. Bankers Trust Co., 565 F.2d 1276, 1278 (4th Cir. 1977). Contra, Reiherzer v. Shannon, 581 F. 2d 1266 (7th Cir. 1978) (criticized in Cowan, 586 F.2d at 894 n.13). In post argument briefs the defendants strongly urge that

Cowan and Martin require a dismissal of this case for lack of jurisdiction.[3]

Because of the difficult constitutional problem that would accompany a conclusion contrary to that reached in Cowan, and because ERISA sets a certain date on which federal law supersedes that of the states, see 29 U.S.C.A. §1144(b)(1), it falls our lot to determine precisely when the cause of action arose and what acts of the defendants furnished the basis for suit. Assuming Cowan correctly blazed what the court acknowledged was a "tortuous path" leading to the conclusion that ERISA jurisdiction is restricted to cases arising after

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3. In their answer the defendants challenge ERISA jurisdiction as well as the existence of a cause of action.

January 1, 1975,[4] we find that the district court had jurisdiction in this case.[5]

The defendants assert that the governing date is February 21, 1974, when the defendant plan was adopted. They say

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4. Bayles v. Central States, Southeast and Southwest Areas Pension Fund, 602 F.2d 97 (5th Cir. 1979), may forclose inquiry by us. Bayles applied for benefits in June, 1974, and "soon thereafter" took another job. On the basis of his reemployment the trustees denied him a pension. The court repeatedly noted ERISA jurisidiction but never determined the date the cause accrued. The case was decided on the summary calendar, and it is not clear that the panel dealt with this problem.

5. Although Cowan thoroughly and convincingly covers the issue, we emphasize that we do not decide whether the federal courts have jurisdiction over causes of action arising before January 1, 1975. Even if there is federal subject matter jurisdiction in such instances, we must establish when the action matured and when the trustee acted to the detriment of the plaintiff in order to ascertain whether state or federal law controls.

that any acts or omissions for which they are responsible occurred before the beginning of 1975. They also insist that a cause of action for denial of pension benefits accrues not upon denial of benefits, but rather when the claimant becomes entitled to those benefits. If either position is correct[6] we would face the "serious constitutional problem" noted in Westinghouse. Consequently, we consider these two issues separately.

The dilemma stems from the Profit Sharing Plan's retroactive effective date. Section 2.1 of the Profit Sharing Plan provides that "[e]ach employee who is a participant in the trusteed retirement plan will become a participant in the [profit sharing] plan as of the effective

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6. Section 1144(a) (i. e. federal law) does not apply to causes of action arising before January 1, 1975, nor to a review of acts occurring before that date.

date of the plan." In their trial court stipulation, the parties agreed that the controlling issus is whether the plaintiffs were participants "by virtue of the retroactive provisions" of the Profit Sharing Plan. Whatever its meaning may be, no one can, and no one does, seriously deny that the adoption of the Profit Sharing Plan resulted in substantial confusion or that the status of the plaintiffs was fraught with uncertainty.

The defendants maintain that the conduct surrounding adoption of the Profit Sharing Plan must be judged by the legal standards of the time, not by those substituted by ERISA. This is true, but the plaintiffs do not maintain the contrary. The January 1, 1975, effective date of 29 U.S.C.A. §1144 means that the defendants cannot be held liable for damages arising from acts commited in 1974 so

long as those acts comported with state law as it then existed. See also Cowan; Martin.

[2] The Plaintiffs do not rest their case on acts or omissions occurring in 1974 (viz. the suit does not challenge the adoption of the Profit Sharing Plan).[7] The action the plaintiffs protest, and the one we must review, is the trustee's 1975 interpretation of the Profit Sharing Plan. Only with that decision did it become clear that the plaintiffs would be denied

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7. It may be that a claim based on denial of benefits under the Retirement Plan would predate ERISA. That question is not before us. The plaintiffs sued for benefits allegedly due them under the Profit Sharing Plan, not the superseded Retirement Plan.

benefits.[8] This determination took place in 1975, and, thus, was governed by 29 U.S.C.A. §1144, and it follows that the federal courts have §1132 jurisdiction to examine its validity.

The defendants next urge that even if an "essential act" occurred in 1975, the cause of action (if there is one) arose on the adoption date. They reason that a cause of action arises not when an employee is denied benefits, but when he becomes eligible for them. Knauss v. Gorman, 433 F.Supp. 1040, 1042 (W.D.

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8. In Cowan the court observed:

> This is not a case in which the application or interpretation of a pension plan are unclear. In such cases, plaintiff obviously has no cause for complaint until he is refused benefits to which he has some colorable claim, since it cannot be known earlier how the instrument will be interpreted by the trustees.
>
> 586 F.2d at 895.

Pa. 1977), vacated 583 F.2d 82 (3d Cir. 1978); Keller v. Graphic Systems, 422 F.Supp. 1005, 1008 (N.D. Ohio 1976).

The plaintiffs respond that the cause of action came into existence when the trustee denied the plaintiffs' requests for benefits. There is ample support for that proposition. Cowan, 586 F.2d at 895; Reiherzer v. Shannon, 581 F.2d 1266, 1272 (7th Cir. 1978). If the plaintiffs are right, the cause arose in 1975, and this court has jurisdiction even under the rule announced in Cowan.

According to the terms of the Profit Sharing Plan:

> The initial distribution date of a participant who terminates his employement or has his employment terminated by the Employer for any reason other than those specified in [the previous sections, which cover terminations by reasons of retirement, disability or death], shall be the date of termination of his employment even though distribution may be made as of a later date.

Section 6.1(B)[9] The defendants use this provision to further support their assertion that the termination date is controlling. Admittedly, if this argument is correct there would be no jurisdiction.

[3-5] A cause of action accrues when the events upon which it is based occur. See, e. g., Atkins v. Crosland, 417 S.W.2d 150 (Tex. 1967). The distinction between eligibility date and the date of denial of benefits was not relevant in any of the cases cited by the defendants. The most thorough discussion of the matter is contained in Morgan v. Laborers Pension Trust Fund, 433 F.Supp. 518, 522 n. 5 (N.D. Cal. 1977). We agree that a cause

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9. Although benefits are computed in conformity with the date of employment termination, the Profit Sharing Plan contemplates a delay before eventual payment. §6.3(A) ("distribution ... as soon [thereafter] . . . as administratively feasible").

of action does not become a presently enforceable demand until a claim is denied. To hold otherwise

> would put an almost intolerable burden on employees covered by pension plans. It would require individuals who are unversed in the law to be constantly vigilant ... Moreover, claims filed before a pension actually has been denied might be challenged for lack of ripeness. Cf. United Public Workers v. Mitchell, 330 U.S. 75, 86 - 91, 67 S.Ct. 556 [562 - 565], 91 L.Ed. 754 (1947).
>
> Requiring piecemeal challenges before an actual denial has occurred would also result in a great waste of judicial resources.

Id. We hold that for purposes of ERISA a cause of action does not accrue until an application is denied. See quotation from Cowan in note 8. Cf. Kosty v. Lewis, 319 F.2d 744, 750 (D.C. Cir. 1963), cert. denied, 375 U.S. 964, 84 S.Ct. 482, 11 L.Ed.2d 414 (1964) (Statute of limitations does not commence to run until there has been "a clear and continuing repudiation.").

Having concluded there is federal subject matter jurisdiction, we next consider whether the district court erred in denying benefits to the plaintiffs.

Federal common law governs this action. 29 U.S.C.A. §1144(a). See Cowan, 586 F.2d at 894, and Reiherzer, 581 F.2d at 1271, Martin, 565 F.2d at 1278, and their discussion of the legislative history. Compare Martin, 565 F.2d at 1279, with Reiherzer, 581 F.2d at 1271 n. 14.

[6] Although the determination of eligibility for pension benefits seems to be a matter of contract law, "the clear weight of federal authority" mandates that the trustee's determinations of eligibility are to be upheld unless arbitrary or capricious. Bayles v. Central States, Southeast and Southwest Areas Pension

Fund, 602 F.2d 97, 99 and 100 n. 3 (5th Cir. 1979); Bueneman v. Central States, Southeast and Southwest Areas Pension Fund, 572 F.2d 1208, 1209 n. 3 (8th Cir. 1978). But cf. Ramirez v. Lowe, ---F.Supp. ---, No. H-78-1624 (S.D. Texas August 15, 1979), aff'd mem., slip op. 930, --- F.2d --- (5th Cir. Nov. 7, 1980) (vesting).

[7] The trustee's decision withstands scrutiny under this standard. Contra, Tucci v. Edgewood Country Club, 459 F.Supp. 940, 941 - 42 (W.D. Pa. 1978) (similar facts, suspect termination; no enunciated standard of review). He treated all similarly situated persons the same. See Bayles, 602 F.2d at 100; Bueneman, 572 F.2d at 1210. The Profit Sharing Plan's resources are still dedicated to the participants; the trustee's policy will direct money to those who were

employed on the adoption date. See note 2. "The trustees of [a] pension fund may properly enforce pension plan rules limiting pension benefits if an alternative would require inappropriate or unanticipated costs to the fund so as to potentially limit resources available to the proper beneficiaries of a trust." Id.; accord, Sparta v. Lawrence Warehouse Co., 368 F.2d 227, 228 (3d Cir. 1966) (diversity action apparently applying general principles of law).

Certain individual plaintiffs also complain that the trustee did not respond to their requests for information. The defendants deny this allegation. No affidavits were submitted to the trial court, so there was clearly an issue of fact. There was not, however, a "genuine issue as to any material fact" such as

would necessitate a remand. F.R.Civ.P. 56(c).

The stipulation states that "the issue to be determined" is whether the plaintiffs are entitled to benefits. Not only did the plaintiffs allow the question of failure to respond to the request for information to escape the trial court's attention, they did not raise it in this court except in their brief in reply to the defendants' post argument brief.

ERISA's civil enforcement section authorizes the courts to enforce 29 U.S.C.A. §1024(b)(4), which requires the administrator[10] to furnish certain information upon the written request of a participant. Specifically, 29 U.S.C.A. §1132(c) provides that "[a]ny administrator who fails or refuses to comply with a

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10. "Administrator" is defined at 29 U.S.C.A. §1002(16)(A).

request for any information which such administrator is required by this subchapter to furnish to a participant ... may in the court's discretion be personally liable to such participant ... in the amount of up to $100 a day from the date of such failure or refusal..."

[8] The short answer may be that since the plaintiffs were not participants they were not entitled to any information. However, at the time of this request their status was far from clear, and we are not sure that those who may be entitled to benefits should be denied an oppportunity to determine their entitlement. The decision to grant relief under 29 U.S.C.A. §1132(c) is committed to the discretion of the trial judge. We take his disposition of this case as a decision not to grant relief. The plaintiffs have not attempted to demonstrate that they were prejudiced

by the alleged failure to respond, and we cannot say that the district court abused its discretion.

The judgment is AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

UNIT A

NO. 79-2286

RUETTA PARIS, MILDRED CAWTHON
and MARGE KANE,

Plaintiffs-Appellants,

versus

PROFIT SHARING PLAN FOR
EMPLOYEES OF HOWARD B. WOLF,
INC. and EUGENE K. FRIESEN,

Defendants-Appellees.

- - - - -
Appeal from the United States District
Court for the Northern District of Texas
- - - - -

ON PETITION FOR REHEARING
(March 24, 1981)

Before RUBIN, HENDERSON and REAVLEY,

Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ ALBERT J. HENDERSON, JR.
UNITED STATES CIRCUIT JUDGE

Office-Supreme Court, U.S.
FILED
JUL 21 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

No. 80-2185

RUETTA PARIS, MILDRED CAWTHON AND MARGE KANE, INDIVIDUALLY, AND ON BEHALF OF THE CERTIFIED CLASS,

Petitioners,

v.

PROFIT SHARING PLAN OF HOWARD B. WOLF, INC., AND EUGENE K. FRIESEN,

Respondents.

On Petition For a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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RESPONDENTS' BRIEF IN OPPOSITION

To the Supreme Court of the United States:

OPINION BELOW

The opinion of the Fifth Circuit is reported at 637 F.2d 357. The opinion of the District Court for the Northern District of Texas is unreported.

QUESTION PRESENTED

Whether, in the absence of an important federal question, the Court should grant the Petition to review the Fifth Circuit's decision, affirming the decision of the district court,

that the trustees of a profit sharing plan acted in neither an arbitrary nor a capricious manner in determining that petitioners were ineligible to receive plan benefits where the language of the plan did not include petitioners among its participants?

COUNTER-STATEMENT OF THE CASE

Petitioners are former employees of Howard B. Wolf, Inc. or its subsidiary, Marcy Lee, Inc., whose employment ceased after June 1, 1973, but before February 21, 1974. Before ceasing employment, petitioners participated in a Trust Retirement Plan for employees of Howard B. Wolf, Inc. On February 21, 1974, after petitioners' employment ceased, the boards of directors of the companies passed two identical resolutions adopting for each company the Profit Sharing Plan for Employees of Howard B. Wolf, Inc. (hereinafter "the Plan") and terminating the pension plan, both effective June 1, 1973. The stated purpose of the Plan is to enable employees to share in the profits of the corporation, and to distribute the corpus and the income of the funds accumulated by the Trust in accordance with the Plan, to the participants or their beneficiaries.

Petitioners, seeking inclusion in the Plan, claim the trustees acted in an arbitrary and capricious manner in determining their ineligibility as non-participants in the Plan. As employees whose employment was terminated even before the Plan was adopted, they contend that they are participants in the Plan and that Plan benefits have been wrongfully withheld.

The Fifth Circuit applied here the rule that the decision of eligibility for plan benefits is a matter concerning which the "clear weight of federal authority mandates that trustees' determinations of eligibility are enforceable unless arbitrary or capricious." (637 F.2d at 362). In affirming summary judgment for respondents, the Fifth Circuit found that the trustees' determination that petitioners are, as non-participants, ineligible to receive Plan benefits, withstands strict scrutiny and was neither arbitrary nor capricious. Further, the Court, addressing petitioners' claim that the Plan administrator was liable for non-compliance with petitioners' request for Plan information, disposed of the argument, saying:

> The short answer may be that since the plaintiffs were not participants they were not entitled to any information... We cannot say that the district court abused its discretion.

(637 F.2d at 362).

ARGUMENT

1. The Fifth Circuit correctly ruled that the trustees' decision determining that petitioners, as non-participants in the Plan, are ineligible to receive its benefits withstands strict scrutiny under the "arbitrary and capricious" standard.

Petitioners concede at page seven of the Petition that:

> The sole issue under both questions presented here is whether or not petitioner-employees can be excluded as participants in the defendant plan in spite of the express language to the effect that all employees on the effective date of June 1, 1973, were included, merely

because the plan was formally adopted after the termination of petitioner employees.

Petitioners' very statement of the issue demonstrates that, on the record here, there is no reason why the writ should be granted. Petitioners raise no important federal question but simply continue an effort, rejected both by the district court and by the Fifth Circuit, to constitute themselves as participants in the respondent Plan where it does not so provide.

The Fifth Circuit, citing *Bayles v. Central States, Southeast and Southwest Areas Pension Fund*, 602 F.2d 97, 99, 100 (5th Cir. 1979), held that, under federal law, the determinations of trustees of a pension plan are to be upheld unless they are arbitrary or capricious. (637 F.2d at 362). Applying the "arbitrary and capricious" standard to the determination of the Plan trustees, the Fifth Circuit correctly concluded that the trustees' determination that petitioners, as non-participants, are ineligible to receive Plan benefits withstands strict scrutiny under the "arbitrary and capricious" standard. The Fifth Circuit expressly found that the Plan trustees treated all persons in petitioners' class the same, that the Plan's resources are still dedicated to its participants and that the trustees properly directed benefits only to those who were employed on the adoption date of the Plan. (637 F.2d at 362).

The "arbitrary and capricious" standard as applied to scrutinize the determinations of trustees in administering benefit plans is enunciated by the Fifth Circuit in *Bayles, id.*

at 99-100. The clear weight of federal authority mandates that trustees' determinations of eligibility are to be upheld unless arbitrary or capricious. *Bayles, id.; Bueneman v. Central States, Southeast & Southwest Areas Pension Fund,* 572 F.2d 1208 (8th Cir., 1978) (upholding the trustees' determination refusing retroactive participation). Both *Bayles* and *Bueneman* articulate the rule that judicial intervention concerning the determinations of plan trustees is limited and courts are hesitant to interfere with the administration of a plan.

Both the Employee Retirement Income Security Act of 1974 ("ERISA") and the common law of trust require that trustees discharge their duties with respect to a plan solely in the interest of providing benefits to their beneficiaries, and defraying reasonable expenses of administering the plan. 29 U.S.C. § 1104. The trustees here, relying on the language of the Plan, reasonably determined that petitioners were, as non-participants, ineligible to receive Plan benefits. In so determining, the trustees conserved the stated benefits of eligible participants under the Plan, and the Fifth Circuit so held.

As the Fifth Circuit noted in its opinion at page 362, the Plan trustees' determination of ineligibility comports with the standards to be followed where eligibility is in issue. *See Sparta v. Lawrence Warehouse Co.,* 368 F.2d 227, 228 (3rd Cir. 1966), holding in pertinent part:

> The trustees of a pension fund may properly enforce the pension plan rules limiting pension benefits if an alternative would require inappropriate or unanticipated

> costs to the fund so as to potentially limit resources available to the proper beneficiaries of the trust.

Scrutinizing strictly the determination of the Plan trustees that petitioners are ineligible as non-participants, the Fifth Circuit correctly ruled that the trustees' determination was neither arbitrary nor capricious. The Fifth Circuit held:

> The trustee's decision withstands scrutiny under this standard. *Contra, Tucci v. Edgewood Country Club*, 459 F. Supp. 940, 941-42 (W.D.Pa. 1978) (similar facts, suspect termination; no enunciated standard of review). He treated all similarly situated persons the same. *See Bayles*, 602 F.2d at 100; *Bueneman*, 572 F.2d at 1210. The Profit Sharing Plan's resources are still dedicated to the participants; the trustee's policy will direct money to those who were employed on the adoption date.

Opinion at page 362.

Petitioners have not shown that the Fifth Circuit incorrectly applied the "arbitrary and capricious" standard in scrutinizing strictly the trustee's decision and in finding that decision to withstand scrutiny. Instead, without any standing to do so, the petitioners merely complain in this connection concerning claimed inequities in the allocation of Plan benefits as between the 148 participants whom the trustees deemed eligible to receive benefits. Petitioners' argument offers no reason for any review of the trustees' determination that Petitioners themselves, as non-participants, are ineligible to receive Plan benefits.

2. The Fifth Circuit correctly affirmed the judgment of the district court that petitioners are not participants in the Plan.

Petitioners are not offerees of the Plan, which was established "for the purpose of enabling employees to share in the profits of the corporation". They were not employees of either of the companies at the time the Plan was adopted. The Plan does not provide for "former employees", nor did it bind former employees in any way. "Employees", as that term is used in the Plan, can only mean those persons employed on or after the date it was adopted and the offer was made.

In *Sparta, supra*, the Third Circuit recognized the impossibility of a former employee being an offeree of a unilateral contract which could be accepted only by performance. The facts of *Sparta* differ from those of the present case in only one significant respect: the court there construed an amendment to a pension plan, rather than the termination of an old plan and the subsequent creation of a new plan. In *Sparta*, employees whose employment had terminated before the change in the pension plan was adopted argued that they were included in the amended plan by virtue of a provision making the plan retroactive. The Third Circuit rejected this argument, affirming the district court's decision that the plan was applicable only to those who were employees when the revision was adopted.

Petitioners argue, as they already have below, that *Sparta* is superceded by *Tucci v. Edgewood Country Club*, 459 F.Supp. 940 (W.D. Pa. 1978). *Tucci* is readily distinguish-

able from the case before this Court in that the plan in *Tucci* contained language which specifically named the plaintiffs as participants:

> All persons covered under the existing plan on May 31, 1975, will be covered under the restated plan . . .

Tucci at 942.

No such express language is present in this Plan. *Tucci* does not cite *Sparta*, and there is nothing to indicate that *Tucci* stands for a proposition contrary to *Sparta*.

Petitioners attack *Sparta* on the ground that the language of the plan construed is unknown. The court in *Sparta* did not refer to such language, probably because such a reference was not necessary. Basic principles of contract as set forth in the *Sparta* opinion required the court to conclude that an offer of participation in a profit sharing plan can only be accepted by continued employment. The same is true here.

Unlike *Tucci*, the language of the Plan before this Court simply does not include petitioners as participants. The Plan distinguishes between its effective date and its establishment date. Under the heading "Purpose of the Plan", the specific language provides:

> "This Agreement, *establishing* the profit sharing plan for employees for Howard B. Wolf, Inc., is effective as of June 1, 1973, and *is established* by Howard B. Wolf, Inc. . . . for the purpose of enabling its employees to share in the profits of the corporation and of distributing the corpus and income of the funds, accumulated

by the Trust in accordance with the Plan, to the participants or their beneficiarier". (Emphasis added).

The Plan was established on February 21, 1974, not June 1, 1973. The words "employees" and "participants" without further qualification, must designate those persons employed both on the date the Plan was established and on the date the language was adopted: February 21, 1974. Petitioners were not employees on February 21, 1974. The only reasonable reading of the terms of the Plan is that the effective date, June 1, 1973, was for its fiscal year and transfer of funds purposes and, further, that the Plan includes only those who were employed at the time it was established.

Petitioners' claim, constituting themselves as participants in the Plan, was correctly decided by the district court, and the decision of that court was correctly affirmed by the Fifth Circuit. Furthermore, petitioners here purport to raise an issue which, in fact, merely calls for this Court to substitute its judgment for that of the district court and that of the Fifth Circuit. Both of those courts held expressly that petitioners are not participants in the Plan, as its trustees properly determined.

CONCLUSION

Petitioners have failed twice below to constitute themselves as participants in the Plan where it does not so provide and where the law does not so permit. The judgments below, that petitioners take nothing, were right in both law and equity. Petitioners have shown nothing, and there is nothing, which would merit a review of those judgments by this Court. Accordingly, the Petition should be denied.

Respectfully submitted,

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PROOF OF SERVICE

I, N. Henry Simpson III, one of the counsel for respondents, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 21st day of July, 1981, I served a copy of the foregoing Respondents' Brief in Opposition by mailing three copies in a duly addressed envelope, first class postage prepaid, to Robert Ardine (Dean) Carlton, The Carlton Firm, 3109 Carlisle, P. O. Box 19427, Dallas, Texas 75219, counsel for petitioners.

N. Henry Simpson III